Siow Kwang Joon & Anor v Asia Commercial Finance (M) Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–46–1995
ABDUL MALIK ISHAK J
30 SEPTEMBER 1996

Contract *— Guarantee — Continuing guarantee — Notice of revocation — Whether notice was clear and explicit — Whether guarantee was revoked by each of the guarantors when their written notices of withdrawals were transmitted to the respondent — Contracts Act 1950 s 83*

Contract *— Guarantee — Construction — Whether guarantee is in fact contract of indemnity — Question of construction in each particular case — Regard to be had to language of instrument and surrounding circumstances*

Contract *— Uncertainty — Agreement contained two different dates — Whether agreement vitiated*

Civil Procedure *— Appeal — Introduction of new points — Appellant raised illegality of contract despite not pleading or raising it during trial — Whether can be adjudicated by the appellate court*

Pursuant to a master agreement dated 14 May 1977 ('the master agreement') executed between the respondent and a motor dealer company known as Larkin Motor Trading Sdn Bhd ('Larkin'), the respondent provided hire-purchase facilities to Larkin's customers when those customers purchased motorcars from Larkin. In consideration of the respondent extending the hire purchase facility to the prospective customer, Larkin undertook to indemnify the respondent against 'all damage, losses, costs and expenses whatsoever' which may be incurred by the respondent. The appellants were, at the material times, directors of Larkin and they stood as guarantors and they guaranteed all sums due to the respondent under the master agreement. They signed a guarantee document dated 14 May 1977 to that effect. Clause 8(f) of the master agreement stated that the guarantee was a continuing guarantee. By letters dated 18 March 1977 and 21 November 1985 respectively, the second and the first appellant informed the respondent that they wanted to withdraw themselves as guarantors. The guarantee document, which was collateral to the master agreement, was totally silent in regard to the right of the guarantor to revoke the guarantee. Larkin failed to indemnify the respondent. The appellants were sued by the respondent for the debts of Larkin. The sessions court ('the trial court') allowed the respondent's claim for the sum of RM44,772.39 with interest and costs. The appellants appealed. The issues before the court were: (i) whether the guarantee was revoked by each of the appellants when their written notices of withdrawal were transmitted to the respondent; and (ii) whether each of the appellants signed a guarantee or an indemnity document. It was argued by counsel for both appellants that there was an effective revocation of the guarantee

document by the appellants within the ambit and scope of s 83 of the Contracts Act 1950 ('the Act'). It was also argued that the guarantee document was void as it was founded on a master agreement which was void for uncertainty as it bore two different dates. A fresh point which was not argued before the trial court was raised by counsel for the appellants, ie the issue of illegality. It was argued that the guarantee document offended against s 2 of the Hire Purchase Act 1967 and consequently, it was null and void and of no effect. Evidence was given that Larkin was represented by the second appellant when it signed the master agreement with the respondent, and the second appellant also stood as one of the guarantors and he signed the guarantee document. It was argued that the second appellant as the representative of Larkin should not have signed the guarantee document and be one of the guarantors. It was also argued that the court had the jurisdiction to hear and adjudicate on that fresh point.

Held, allowing the appeal with costs:

(1) Pursuant to s 83 of the Act, it is apparent that a continuing guarantee may be revoked: (a) at any time; (b) as to future transaction; (c) by the surety; and (d) by notice to the creditor. Generally, when a guarantee is continuing, unless there is a provision in the guarantee document to the contrary, the surety may withdraw at any time as to future transactions by giving notice to the creditor. Once this happens, the surety cannot be held accountable for any advances made, or liabilities incurred because after giving notice he longer stands as a surety. But if there is no provision in the contract of guarantee for withdrawal of the surety, this section gives a blanket statutory power to revoke the continuing guarantee, at any time, in regard to future transactions, by notice to the creditor (see pp 652H–I and 653A).

(2) It is important that to revoke a guarantee, the notice must be couched in a language which is both clear and explicit so that the recipient would understand the contents of the revocation. The revocation must not only be an expression of a wish by the guarantor that the guarantee must be withdrawn. Thus, whether a guarantee has been revoked is dependent on the facts of each particular case (see pp 651D–E and 653B).

(3) The words employed in the letter of revocation of the first appellant were clear and explicit and it could easily be understood by the respondent. It complied with the requirement that the terms of effective revocation as to future liability be in writing, and it took into account the payment of existing liability of the first appellant. It was a good notice and it had revoked the continuing guarantee (see p 656I); *Commercial Bank of Australia Ltd v Cavanaugh* (1980) 7 NTR 12 followed.

(4) The second appellant withdrew himself as a guarantor on 18 March 1977, ie before the guarantee document was dated (14 May 1977) and stamped (16 May 1977). The inference

A that can be drawn from this was that the second appellant must have signed the guarantee document, which was undated at the material time, on or before 18 March 1977. In the court's judgment, the second appellant had effectively revoked his suretyship on 18 March 1977 and he could not now be accountable to indemnify the respondent (see p 658D–F).

B (5) To ascertain and determine whether a contract is one of guarantee or of indemnity is entirely a question of construction in each particular case. The authorities show the need to construe the agreement in a reasonable way by taking into account all the surrounding circumstances (see pp 660H and C 661A–B).

(6) Upon reading the guarantee document, it was abundantly clear that it was couched as an indemnity. The words: 'we ... jointly and severally agree to pay to you by way of indemnity' explicitly described the role of the guarantors as indemnifiers D to the respondent under the master agreement (see pp 659I and 660A).

(7) The appellants here merely signed an indemnity to indemnify the respondent, and since they had revoked that indemnity, no liability would attach to them (see p 661F–G).

E (8) The master agreement, especially the nature of its terms, can be ascertained, and being a business agreement it must be construed fairly and broadly. The only defect as submitted in regard to the master agreement was that it bore two dates. This would not vitiate the master agreement. Both s 93 of the Evidence Act 1950 and s 30 of the Act cannot be invoked to F strike down the master agreement as those sections relate to the ambiguity or defectiveness or uncertainty of the language employed in any agreement and not on the point as raised by counsel for the appellant. At any rate, the master agreement was duly stamped on 16 May 1977 and that gave it a semblance G of legality (see pp 655H–I and 656A–B).

(9) It is entirely up to the discretion of the appellate court whether to allow a fresh point which was not argued before the trial court to be ventilated in the appellate court (see p 661H–I); *Perkowski v Wellington Corp* [1959] AC 53 and *Connecticut Fire* H *Insurance Co v Kavanagh* [1892] AC 473 followed.

(10) It is now settled law that any contract including a contract of indemnity like the present case which is prohibited by statute, either expressly or by necessary implication, is illegal and void (see p 662D–E); *Cope v Rowlands* (1836) 2 M & W 149 followed.

I (11) Illegality need not be specifically pleaded. Even though it was not argued before the trial court nor pleaded, the court was obliged to consider the illegality issue. The contract of guarantee which was in fact a contract of indemnity contravened s 2 of the Hire Purchase Act 1967 and it was void, illegal and of no

effect (see p 664H); *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161, *Narayanan v Kannamah* [1993] 3 MLJ 730 and *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141 followed; *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (distinguished).

[Bahasa Malaysia summary

Menurut suatu perjanjian induk bertarikh 14 Mei 1977 ('perjanjian induk tersebut') yang disempurnakan di antara penentang dan sebuah syarikat peniaga kereta yang dikenali sebagai Larkin Motor Trading Sdn Bhd ('Larkin'), penentang memberi kemudahan sewa beli kepada pelanggan-pelanggan Larkin apabila pelanggan-pelanggan tersebut membeli kereta daripada Larkin. Sebagai balasan kepada penentang memberi kemudahan sewa beli kepada bakal pelanggan itu, Larkin mengakujanji untuk menanggung rugi terhadap 'semua kerosakan, kerugian, kos dan perbelanjaan walau apa pun' yang akan ditanggung oleh penentang. Perayu-perayu adalah, pada masa berkenaan, pengarah-pengarah Larkin dan mereka bertindak sebagai penggerenti dan mereka menggerenti semua jumlah yang kena dibayar kepada penentang di bawah perjanjian induk tersebut. Mereka menandatangani suatu dokumen gerenti bertarikh 14 Mei 1977. Fasal 8(f) perjanjian induk tersebut memperuntukkan bahawa gerenti itu adalah suatu gerenti berterusan. Melalui surat-surat bertarikh 18 Mac 1977 dan 21 November 1985 masing-masing, perayu-perayu pertama dan kedua memberitahu penentang bahawa mereka ingin menarik diri sebagai penggerenti-penggerenti. Dokumen gerenti, yang kolateral kepada perjanjian induk tersebut, adalah senyap sepenuhnya berkenaan hak penggerenti untuk membatalkan gerenti tersebut. Larkin gagal untuk menanggung rugi penentang. Perayu-perayu didakwa oleh penentang untuk hutang-hutang Larkin. Mahkamah sesyen ('mahkamah perbicaraan') membenarkan tuntutan penentang sebanyak RM44,772.39 dengan faedah dan kos. Perayu-perayu membuat rayuan. Isu-isu di hadapan mahkamah adalah: (i) sama ada gerenti itu dibatal oleh setiap perayu apabila notis-notis bertulis mereka untuk menarik diri diberi kepada penentang; dan (ii) sama ada setiap perayu telah menandatangani satu dokumen gerenti atau dokumen tanggung rugi. Peguam bagi kedua-dua perayu menghujahkan bahawa terdapat pembatalan efektif terhadap dokumen gerenti oleh perayu-perayu dalam linkungan dan skop s 83 Akta Kontrak 1950 ('Akta tersebut'). Adalah juga dihujahkan bahawa dokumen gerenti adalah tidak sah kerana ia berasaskan kepada perjanjian induk tersebut yang tidak sah atas sebab ketidakpastian kerana ia mengandungi dua tarikh yang berlainan. Satu perkara baru yang tidak dihujah di hadapan mahkamah perbicaraan dibangkitkan oleh peguam bagi perayu-perayu, iaitu isu kepenyalahan undang-undang. Adalah dihujahkan bahawa dokumen gerenti itu melanggar s 2 Akta Sewa Beli 1967, dan akibatnya, ia batal dan tak sah dan tidak ada kesan. Keterangan diberikan bahawa Larkin diwakili oleh perayu kedua semasa beliau menandatangani perjanjian induk tersebut

dengan penentang, dan perayu kedua juga menjadi salah seorang daripada penggerenti-penggerenti dan beliau menandatangani dokumen gerenti. Adalah dihujahkan bahawa perayu kedua selaku wakil Larkin tidak patut menandatangani dokumen gerenti dan menjadi salah seorang daripada penggerenti-penggerenti. Adalah juga dihujahkan bahawa mahkamah mempunyai bidang kuasa untuk mendengar dan membuat keputusan dalam perkara baru itu.

Diputuskan, membenarkan rayuan itu dengan kos:

(1) Mengikut s 83 Akta tersebut, adalah jelas bahawa suatu gerenti berterusan boleh dibatalkan: (a) pada bila-bila masa; (b) terhadap transaksi masa depan; (c) oleh penjamin; dan (d) dengan notis kepada pemiutang. Secara umum, apabila suatu gerenti adalah berterusan, melainkan ada peruntukan dalam dokumen gerenti yang memperuntukkan sebaliknya, penggerenti boleh menarik diri pada bila-bila masa terhadap transaksi masa depan dengan memberi notis kepada pemiutang. Apabila ini berlaku, penggerenti tidak boleh dianggap bertanggungjawab untuk sebarang pinjaman yang dibuat, atau liabiliti yang ditanggung kerana selepas notis diberikan beliau tidak lagi menjadi penggerenti. Tetapi jika tidak ada peruntukan di dalam kontrak gerenti untuk penggerenti menarik diri, seksyen ini memberi suatu kuasa statutori yang menyeluruh untuk membatalkan gerenti berterusan itu pada bila-bila masa, terhadap transaksi masa depan, dengan notis kepada pemiutang (lihat ms 652H–I dan 653A).

(2) Apa yang penting dalam pembatalan sesuatu gerenti adalah notis itu mesti ditulis dalam bahasa yang nyata dan juga jelas supaya penerima boleh memahami kandungan pembatalan itu. Pembatalan itu mestilah bukan hanya suatu penyataan keinginan penggerenti bahawa gerenti itu hendaklah ditarik balik. Maka, sama ada suatu gerenti telah dibatalkan adalah bergantung kepada fakta-fakta setiap kes tertentu (lihat ms 651D–E dan 653B).

(3) Perkataan-perkataan yang digunakan dalam surat pembatalan perayu pertama adalah nyata dan jelas dan ia boleh difahami dengan senang oleh penentang. Ia mematuhi keperluan bahawa terma-terma pembatalan efektif liabiliti masa depan adalah bertulis, dan ia mengambil kira bayaran liabiliti sedia ada perayu pertama. Ia adalah satu notis yang baik dan ia telah membatalkan gerenti berterusan itu (lihat ms 656I); *Commercial Bank of Australia Ltd v Cavanaugh* (1980) 7 NTR 12 diikut.

(4) Perayu kedua menarik diri sebagai penggerenti pada 18 Mac 1977, iaitu sebelum dokumen gerenti itu diberi tarikh (14 Mei 1977) dan disetemkan (16 Mei 1977). Inferens yang boleh dibuat daripada ini ialah perayu kedua semestinya telah menandatangani dokumen gerenti, yang tidak bertarikh pada masa material, pada atau sebelum 18 Mac 1977. Dalam penghakiman mahkamah, perayu kedua telah membatalkan

dengan efektif penjaminannya pada 18 Mac 1977 dan beliau tidak boleh kini bertanggungjawab untuk menanggung rugi penentang (lihat ms 658D–F). A

(5) Untuk memastikan dan menentukan sama ada suatu kontrak itu satu gerenti atau tanggung rugi adalah sepenuhnya satu soalan pentafsiran dalam setiap kes yang tertentu. Autoriti-autoriti menunjukkan keperluan untuk mentafsir perjanjian itu secara munasabah dengan mengambil kira semua keadaan sekelilingnya (lihat ms 660H dan 661A–B). B

(6) Setelah membaca dokumen gerenti itu, adalah sangat jelas bahawa ia ditulis sebagai suatu tanggung rugi. Perkataan-perkataan: 'kami...secara bersama dan berasingan bersetuju untuk membayar kepada kamu dengan cara tanggung rugi' secara jelas menerangkan peranan penggerenti-penggerenti sebagai penanggung rugi-penanggung rugi kepada penentang di bawah perjanjian induk tersebut (lihat ms 659I dan 660A). C D

(7) Perayu-perayu di sini hanya menandatangani tanggung rugi untuk menanggung rugi penentang, dan oleh kerana mereka telah membatalkan tanggung rugi itu, tiada liabiliti yang dikaitkan dengan mereka (lihat ms 661F–G).

(8) Perjanjian induk tersebut, terutamanya sifat terma-termanya, boleh dipastikan, dan kerana ianya adalah suatu perjanjian perniagaan ia mesti ditafsir secara adil dan meluas. Kecacatan yang hanya ada seperti yang dihujahkan ialah ia mengandungi dua tarikh. Ini tidak akan menjadikan perjanjian induk itu tidak sah. Kedua-dua s 93 Akta Keterangan 1950 dan s 30 Akta tersebut tidak boleh digunakan untuk membatalkan perjanjian induk tersebut kerana seksyen-seksyen itu berhubung dengan ketaksahan atau kecacatan atau ketidakpastian bahasa yang digunakan dalam apa-apa perjanjian dan tidak dengan perkara yang dibangkitkan oleh peguam bagi perayu. Dalam apa keadaan pun, perjanjian induk itu telah disetemkan pada 16 Mei 1977 dan ini telah memberikannya suatu perlihatan kesahan (lihat ms 655H–I dan 656A–B). E F G

(9) Adalah keseluruhannya terpulang kepada budi bicara mahkamah rayuan sama ada untuk membenarkan suatu perkara baru yang tidak dihujahkan di mahkamah perbicaraan untuk dibentangkan di mahkamah rayuan (lihat ms 661H–I); *Perkowski v Wellington Corp* [1959] AC 53 dan *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 diikut. H

(10) Ia adalah kini suatu ketetapan undang-undang bahawa mana-mana kontrak termasuk suatu kontrak tanggung rugi seperti kes ini yang ditegah oleh statut, sama ada secara nyata atau secara tersirat, adalah menyalahi undang-undang dan tidak sah (lihat ms 662D–E); *Cope v Rowlands* (1836) 2 M & W 149 diikut. I

(11) Penyalahan undang-undang tidak perlu diplidkan secara spesifik. Walaupun ia tidak dihujahkan di mahkamah perbicaraan atau diplidkan, namun mahkamah adalah berkewajipan untuk mempertimbangkan isu kepenyalahan undang-undang itu. Kontrak gerenti yang sebenarnya adalah suatu kontrak tanggung rugi telah melanggar s 2 Akta Sewa Beli 1967 dan ia adalah tidak sah, menyalahi undang-undang dan tidak mempunyai kesan (lihat ms 664H); *Scott v Brown Doering McNab & Co* [1892] 2 QB 724, *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161, *Narayanan v Kannamah* [1993] 3 MLJ 730 dan *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141 diikut; dan *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 dibeza.]

[*Editorial Note*: The respondent has applied for leave to appeal to the Court of Appeal vide Civil Application No B–08–469–96.]

Notes

For cases on guarantee, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1628–1731.

For a case on contract void for uncertainty, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2280.

For cases on introduction of new points on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 526–565.

Cases referred to

Argo Caribbean Group Ltd v Lewis [1976] 2 Lloyd's Rep 289
Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani [1986] 1 MLJ
Bastow v Bennett (1812) 3 Camp 220, NP 16
Beckett & Co v Addyman (1881–82) 9 QBD 783
Benge v Nanna (1979) 100 DLR (3d) 218
Bull v Attorney General for NSW (1913) 17 CLR 370
Chitwell Shipping Ltd v State Bank of India, The World Symphony [1987] 1 Lloyd's Rep 165
Chow Yoke Pui v Hongkong & Shanghai Banking Corp, Malacca [1971] 2 MLJ 100
Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone [1987] 1 Lloyd's Rep 546
Coles v Pack (1869) LR 5 CP 65
Commercial Bank of Australia v Cavanaugh (1980) 7 NTR 12
Connecticut Fire Insurance Co v Kavanagh [1892] AC 473
Cope v Rowlands (1836) 2 M & W 149; 150 ER 707
Coulthart v Clementson & Anor (1879–80) 5 QBD 42
Crace, Re Balfour v Crace [1902] 1 Ch 733
Dickson v Royal Bank of Canada (1975) 66 DLR (3d) 242
Egbert v National Crown Bank [1918] AC 903
Harris v Fawcett (1813) 8 Ch App 866
Hartland v Jukes (1863) 1 H & C 667
Hong Leong Finance Bhd v Thamilchelevan s/o Palinesamy & Anor [1996] 1 MLJ 351

Hough v Warr (1824) 1 C&P 151, NP
Jones v Birch Bros Ltd [1933] 2 KB 597
Lothian v Epworth Press [1928] 1 KB 199
Lloyd's v Harper (1880–81) 16 Ch D 290
Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161
Moorcock, The (1886–90) All ER 530
Moshci v Lep Air Services Ltd [1973] AC 331; [1972] 2 All ER 393
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416
Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141
Narayanan v Kannamah [1993] 3 MLJ 730
National House-Building Council v Fraser [1983] 1 All ER 1090
Offord v Davies (1862) 12 CBNS 748; 142 ER 1336
Oriental Bank of Malaya Ltd v N Subramaniam [1958] MLJ 35
Perkowski v Wellington Corp [1959] AC 53
Scammell v Ouston [1941] AC 251; [1941] 1 All ER 14
Scott v Brown Doering McNab & Co [1892] 2 QB 724
'Tasmania', The (1890) 15 App Cas 223
Westhead v Sproson (1861) 6 H & N 728
Wingfield v de St Croix (1919) 35 TLR 43
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410
Yeoman Credit Ltd v Latter [1961] 2 All ER 294

Legislation referred to

Contracts Act 1950 ss 30, 82, 83
Evidence Act 1950 s 93
Hire Purchase Act 1967 s 2

Appeal from: Summons No 52–247–1991–2 (Sessions Court, Johor Bahru)

Ibrahim Hashim (*Hassan Ibrahim & Co*) for the appellants.
Alexander TH Keong (*NK Tan & Rahim*) for the respondent.

Abdul Malik Ishak J: This was an appeal against the decision of the Sessions Court, Johor Bahru ('the trial court') which allowed the respondent's claim for the sum of RM44,772.39 with interest and costs which was based on a master agreement dated 14 May 1977 ('the master agreement') executed between the respondent and a motor dealer company known as Larkin Motor Trading Sdn Bhd (the first defendant before the trial court) ('Larkin'). It was pleaded in the statement of claim that pursuant to the master agreement, the respondent had granted hire purchase facilities to Larkin's customers when those customers purchased motorcars from Larkin. Both the appellants (the third and fifth defendants respectively before the trial court) were, at the material times, directors of Larkin and they stood as guarantors and they guaranteed all sums due to the respondent under the master agreement. They signed a guarantee document to that

effect. It must be pointed out that Kwan Fook Nam and Tan Choo Sai who were the second and fourth defendants respectively before the trial court, but not parties in the present appeal, were also the guarantors under a guarantee document for Larkin under the master agreement, and they too were dragged to court by the respondent. As an offshoot of the trial court's decision, only the third and fifth defendants before the trial court were dissatisfied with the decision of the trial court and they now appealed against that decision. As guarantors under the guarantee document, the appellants were sued by the respondent for the debts of Larkin when the latter failed to indemnify the respondent.

By letter dated 18 March 1977, the second appellant intimated his desire to the respondent to have himself relieved of the onerous burden of being a guarantor. The first appellant — through his counsel — by letter dated 21 November 1985, also expressed his wish to withdraw himself as a guarantor.

Two issues were ventilated before the trial court and they were once again canvassed before me, namely:

(1) whether the guarantee was revoked by each of the appellants when their written notices of withdrawal were transmitted to the respondent; and

(2) whether each of the appellants signed a guarantee or an indemnity document.

The first issue

It was argued by Mr Ibrahim Hashim, learned counsel for both the appellants, that there was an effective revocation of the guarantee document by the appellants within the ambit and scope of s 83 of the Contracts Act 1950 ('the Act'). That section enacts as follows:

> A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

The words 'future transactions' must necessarily mean, and be taken to imply that this section should relate and be confined to those cases where a series of distinct and separate transactions are contemplated. It is certainly not the same as in the case of an entire consideration. Where a continuing relationship is constituted on the faith of a guarantee, that guarantee cannot be annulled in any way during the continuance or subsistence of that relationship. It is interesting to note that s 82 of the Act enacts that:

> A guarantee which extends to a series of transactions is called a 'continuing guarantee'.

Illustrations (a) and (b) of s 82 of the Act clearly show what should constitute a continuing guarantee. Illustration (c) of s 82 of the Act clearly shows a guarantee which is not continuing and it is ideal for the present exercise to quote it in verbatim:

> (c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks

> to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not for a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

It must not be forgotten that whether a guarantee is continuing or not is solely dependent on the intention of the parties (per Bovill CJ in *Coles v Pack* (1869) LR 5 CP 65 at p 70):

> ...as expressed by the language they have employed, understanding it fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written.

It is now appropriate to examine some English authorities on the issue of what constitutes an effective revocation of the guarantee document.

In *Hough v Warr* (1824) 1 C&P 151, NP where the brief facts were that a letter from a surety for a collector to the obligees of his bond stating that he will not be liable after the date of the letter, was held to be no defence if it was not pleaded specifically. But if it was pleaded, Abbot CJ said:

> I think they may till it is revoked. At all events you should have pleaded it.

The case of *Bastow v Bennett* (1812) 3 Camp 220, NP can be briefly stated as follows. The defendant gave an undertaking to the plaintiff in this fashion:

> I hereby undertake and engage to be answerable to the extent of 300 pound for any tallow or soap supplied by Mr Bastow to France & Bennett, provided they shall neglect to pay in due time.

The plaintiff immediately thereafter supplied tallow and soap to France & Bennett to a large amount, at two months' credit. They regularly paid him above £300, but in the summer of 1810 they owed him a larger sum, and became considerably embarrassed in their circumstances. A meeting of their creditors was then held, at which it was agreed that the creditors should continue to supply them with goods payable in ready money, but that the payments made should be applied to the old debts till they were satisfied. The plaintiff opened a new account with France & Bennett on this footing; and they afterwards became bankrupt, being indebted to him for tallow and soap in the sum of £547 10s. The balance of the first account, however, was nearly satisfied. It was contended by counsel for the plaintiff on the authority of *Mason v Pritchard* 12 East 227; 2 Campb 436 that the defendant was liable to the full amount of £300. In rebuttal, counsel for the defendant insisted that after the sum of £300 had been once paid to the plaintiff by France & Bennett, the guarantee was exhausted. Lord Ellenborough in a short judgment said at p 136:

> The defendant here became answerable for any soap or tallow supplied by the plaintiff to France & Bennett. Without the word 'any', it might perhaps have been confined to one dealing to the amount of 300 pound; but, as it is actually worded, I am of the opinion that it remained in force while the parties continued to deal on the footing established when it was given. But I think the goods supplied after the new arrangement were not within the

A scope of the guarantee; and that the defendant is only answerable for the unsatisfied balance of the old account.

Since time immemorial, it has been established that a guarantor's promise, unless made by deed, does not bind him until the promisee has accepted it: *Westhead v Sproson* (1861) 6 H & N 728, *Offord v Davies* (1862) B 12 CBNS 748; 142 ER 1336 and *Hartland v Jukes* (1863) 1 H & C 667. It follows therefore, as night follows day, that a guarantee not made as a deed may therefore be revoked at any time before it has been accepted, provided that the revocation in question is communicated to the offeree (*Re Crace, Balfour v Crace* [1902] 1 Ch 733 at p 737). In *Offord v Davies* (1862) 12 CBNS 748; 142 ER 1336, where a guarantee expressed to last C 'for the space of twelve calendar months' was held to have been validly revoked within that period, because the creditor had not acted on the faith of it by the time he received notice of revocation. Thus, the guarantor may revoke the guarantee when the contract of guarantee provides specifically that it is revocable by way of a notice: *Commercial Bank of Australia v* D *Cavanaugh* (1980) 7 NTR 12. It must be stressed that purported revocation would be ineffective for the simple reason that notice is not delivered to the creditor. The revocation too must be clear and explicit so that the recipient would understand the contents of the revocation. Put in another way, the revocation must not only be an expression of a wish by the guarantor that the guarantee must be withdrawn. It must also comply E strictly with the terms of the clause of revocation: *Dickson v Royal Bank of Canada* (1975) 66 DLR (3d) 242 and *Benge v Nanna* (1979) 100 DLR (3d) 218. Another example would be found in the case of *Commercial Bank of Australia Ltd v Cavanaugh* (1980) 7 NTR 12, where the relevant clause provided that the guarantee should remain in force until it was determined F as to future advances by notice in writing given by the guarantors to, and received by, the manager for the time being of the branch where the account of the customer was kept and until the guarantors had paid to the bank the full amount for which the guarantors were liable. It was held, inter alia, that under the terms of the guarantee, effective revocation as to future liability demanded two things: one, notice in writing and, two, the G payment of any existing liability by the guarantor. Two classical methods of tendering a notice of revocation would be as envisaged in *Egbert v National Crown Bank* [1918] AC 903 where the notice of revocation was couched in such a way as to show that the notice of revocation would not be effective until all the co-guarantors give such a notice, and that as set H out in *Harris v Fawcett* (1813) 8 Ch App 866, where the notice of revocation would say that the guarantee would continue to be in force until a certain period of time has elapsed after the notice was given. It takes a person of dignity and refined upbringing to tender a notice of revocation as illustrated in these two cases. What then is the effect of the guarantor revoking the guarantee? It is, according to *National House-Building Council v Fraser* I [1983] 1 All ER 1090, to prevent any future liability arising under the guarantee, but the revocation in no way relieves the guarantor from liability which he has already incurred.

Coulthart v Clementson (1879–80) 5 QBD 42 at pp 46–47, *Lloyd's v Harper* (1880–81) 16 Ch D 290 at p 314, *Re Crace, Balfour v Crace* [1902]

1 Ch 733, *Beckett & Co v Addyman* (1881–82) 9 QBD 783 at p 791 and *Offord v Davies* (1862) 12 CBNS 748; 142 ER 1336 all show a singular trend which should be applied vigorously to the facts of this case as will be demonstrated in due course, and that trend is this: that if the guarantee is a continuing guarantee and the consideration for the guarantee is divisible, the guarantee is revocable in respect of liability that is scheduled to accrue in the future. A common example of this type of guarantee can be found in many jurisdictions typical of which would be in regard to a guarantee in respect of advances made or goods supplied from time to time, segment by segment by the creditor to the principal: *Coulthart v Clementson* (1879–80) 5 QBD 42 would be in respect of advances; *Beckett & Co v Addyman* (1881–82) 9 QBD 783 would be in relation to goods to be supplied from time to time; and *Wingfield v de St Croix* (1919) 35 TLR 43 relate to a guarantor of rent payable under weekly tenancy, and that guarantor may revoke the guarantee on expiry of each week of the lease. I adopt the view and it is my judgment that a guarantee of future advances is merely an arrangement where the crucial consideration is supplied from time to time, segment by segment. The rule that allows a continuing guarantee whose consideration is divisible and therefore capable of revocation in respect of future liability has been accepted and attracted considerable judicial support. Firstly, it is said that each advance constitutes consideration for the promise to guarantee so that for future advance, the guarantee does not become legally binding promise until it is supported by a consideration and until the advance is made. Secondly, the rule is based on equitable ground as explained by James LJ in *Lloyd's v Harper* (1880–81) 16 Ch D 290 in these words:

> It may be considered equitable and right that where a man is not under any obligation to make further advances or to sell further goods, a person who has guaranteed repayment of such advances, or payment of the price of the goods, may say: 'Do not sell any further goods or make any further advances; I give you warning that you are not to rely upon my guarantee for any further advances which you make, or for any further goods you sell'. That might be in many cases a very equitable view. It perhaps might be hardly equitable for a banker or merchant to go on making advances after receiving a distinct notice from the guarantor that he would not be further liable.

Now, reverting back to s 83 of the Act, it is apparent that a continuing guarantee may be revoked:

(a) at any time;

(b) as to future transaction;

(c) by the surety;

(d) by notice to the creditor.

In statutory form, this section is all encompassing and it gives the surety or the guarantor statutory relief from a continuing guarantee. Generally, when a guarantee is continuing in form and texture — unless there is a provision in the guarantee document to the contrary — the surety may withdraw at any time as to future transactions by giving notice to the creditor. Once this happens, the surety cannot be held accountable for any

A advances made, or liabilities incurred because after giving notice he longer stands as a surety. But if there is no provision in the contract of guarantee for withdrawal of the surety, this section gives a blanket statutory power to revoke the continuing guarantee, at any time, in regard to future transactions, by notice to the creditor. What is important is that to revoke
B a guarantee, the notice must be couched in a language which is both clear and explicit. Thus, whether a guarantee has been revoked, it is at the end of the day, dependent on the facts of each particular case. This section is clear beyond peradventure. It relates to a continuing guarantee (nothing else) which may, at any time (no exception is set out here), be revoked by the surety in relation to future transactions by notice to the creditor.

C It is significant to note that though the word 'surety' in s 83 of the Act is couched in a singular manner, it is to be read widely to include 'sureties'. This seems to be the view adopted in *Egbert v National Crown Bank* [1918] AC 903 and I fully subscribe to this view.

Having reviewed the law, it is now opportune to examine the master
D agreement together with the guarantee document.

Clause 8 (f) of the master agreement specially says that the guarantee is a continuing guarantee and it reads as follows:

> This guarantee shall be a continuing guarantee, and the company's rights
> E hereunder shall not be prejudiced or affected by any indulgence or forbearance on their part extended to the dealer or to any parties to the said hire purchase agreements the subject hereof or by the death, bankruptcy, liquidation, or insolvency of the dealer.

That the master agreement is a continuing guarantee and the consideration for the guarantee is divisible is further reflected at cl 1 of the master
F agreement which reads as follows:

> The company will at the request of the dealer consider and if thought fit accept proposals by intending hirers for hire purchase facilities submitted from time to time by the dealer.

G Again, that the guarantee is also divisible is clearly seen at cl 8 of the master agreement which reads as follows:

> In consideration of the company providing the facilities set forth in this agreement and entering into hire purchase agreements at the request of the dealer with the hirers introduced by the dealer, the dealer hereby guarantees to the company the due performance of all the terms and conditions of each
> H and every hire purchase agreement so entered into under the terms of this agreement and undertakes to indemnify the company against all damage, losses, costs and expenses whatsoever which the company may sustain arising out of each and every transaction including any misrepresentation by a hirer and also by reason of any purported resale of the goods, the subject matter of any hire purchase agreement.

I It is pertinent to observe that no amount was stated in the master agreement. Clause 1 of the master agreement merely says that the respondent would at the request of Larkin consider, and if thought fit, accept proposals by intending hirers for hire purchase facilities submitted from time to time by Larkin. Intending hirers must surely refer to prospective customers of

Larkin. The respondent shall purchase the motorcars and it would then hire it back to the prospective customers. Clause 4 of the master agreement says that if the respondent decides to accept the hirer's proposal it shall sign the hire purchase agreement submitted by Larkin, and thereupon, the respondent shall be deemed to have purchased the goods from Larkin, and the property therein shall pass to the respondent. At the time of filing the statement of claim on 25 April 1991, there were approximately 21 motorcars sold by the respondent. The oldest motorcar that was financed by the respondent was on 8 January 1987 and the latest being 19 July 1990. Unfortunately, from 8 January 1987 to 19 July 1990, Larkin could not pay the instalments incurred to the respondent. There was evidence that from time to time the respondent would grant Larkin financial facilities. Thus, on 5 July 1978, the respondent informed Larkin that the amount granted shall be RM200,000; on 20 January 1981 the amount was increased to RM600,000; on 9 January 1984 the amount was again increased to RM800,000. These facts showed that the respondent continuously granted financial facilities to Larkin and each time there would be a different consideration. Each advance constitutes a separate transaction; it is divisible and, consequently, the guarantee can be revoked at any time with regard to future transactions: *Offord v Davies* (1862) 12 CBNS 748; 142 ER 1336.

The respondent as the company under the master agreement would provide hire purchase facilities to Larkin's customers when those customers purchased motorcars from Larkin. Put in another way, from time to time, Larkin would request the respondent to consider and accept proposal from a prospective customer for hire purchase facility when the prospective customer was interested in purchasing the motorcar from Larkin. When that happens, the respondent would sign the hire purchase agreement submitted by Larkin and the respondent would then be deemed to have purchased the motorcar from Larkin. The motorcar would then be hired back to the prospective customer. In consideration of the respondent extending the hire purchase facility to the prospective customer, Larkin undertakes to indemnify the respondent against 'all damage, losses, costs and expenses whatsoever' which may be incurred by the respondent. It is to be appreciated that a prospective customer would come forward from time to time and each transaction would consequently be in the nature of a guarantee of future advances where the consideration would be supplied from time to time. Flowing from this and on the authorities discussed in the early part of this judgment, the master agreement is capable of being revoked. This is my judgment and I so hold accordingly.

It is also my judgment that cl 8(f) of the master agreement cannot whittle down s 83 of the Act, and the appellants have the authority to revoke the continuing guarantee at any time as to future transactions by notice to the creditor.

The guarantee document which is collateral to the master agreement is totally silent in regard to the right of the guarantor to revoke the guarantee. In order to ascertain the entitlement of both the appellants in regard to their right to revoke the guarantee, one must scrutinize and peruse through the master agreement, which I did, with a toothcomb.

Since I have held that the master agreement could be revoked, the appellants could exercise their inherent right to revoke the guarantee which they had tied themselves to.

The guarantee document was dated 14 May 1977, and it was stamped at the Kuala Lumpur stamp office on 16 May 1977. The master agreement bore two dates: at the top of the master agreement the date specified therein was 14 May 1977 with 16 May 1977 as the date of stamping, but the date specified at the bottom portion purportedly to show the date wherein Kwan Fook Nam (the second defendant before the trial court and not a party to the appeal) signed as a director of Larkin with the second appellant as a witness, bore an entirely different date — it was 6 April 1977. This prompted Mr Ibrahim Hashim, the learned counsel for the appellants, to take a cudgel and he argued strenuously that the guarantee document was void as it was founded on a master agreement which was void as it bore two different dates. The voidness of the master agreement was said to be due to an uncertainty as the date of its execution was uncertain and cannot be ascertained.

Section 93 of the Evidence Act 1950 provides that when the language of a document is ambiguous or defective, no evidence can be given to explain or amend the document. The court too will not enter into the arena by supplying defects or remove ambiguities according to its own notions of what is reasonable for the simple reason that the court is not obliged to make a new contract for the parties. I am fortified in my view on the authority of *Scammell v Ouston* [1941] AC 251; [1941] 1 All ER 14, where the facts were that the respondents there entered into negotiations with the appellants to acquire from the latter a motorlorry, giving an old lorry in part exchange therefor. The parties agreed as to the new lorry to be supplied, its price and the rebate in respect of the old lorry, and, further, they agreed that the balance of the purchase price was to be had on hire-purchase terms over a period of two years. The precise terms of the hire-purchase agreement, however, were not settled. The appellants subsequently repudiated the transaction, on the ground that there never was any concluded agreement at all between the parties, because the terms of the proposed hire-purchase agreement had not been settled. It was held that there was no concluded agreement, since the expression 'on hire-purchase terms' was too vague to be given any definite meaning.

Section 30 of the Act enacts that:

> Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Here before me, the master agreement especially the nature of its terms can be ascertained, and being a business agreement, it must be construed fairly and broadly and, if necessary, there must be implied a term to give business efficacy to the master agreement which must have been intended by the parties: *The Moorcock* (1886–90) All ER 530 at pp 534–535. This does not mean that the true significance of the master agreement should be strained or exceeded, but that it should be construed in such a way so as to give the fullest relief which the fair meaning of its language will allow: *Bull v Attorney General for NSW* (1913) 17 CLR 370. The only defect as

Mr Ibrahim Hashim submitted in regard to the master agreement was that it bore two dates. Would this vitiate the master agreement? The answer would be in the negative. Both ss 93 of the Evidence Act 1950 and s 30 of the Act cannot be invoked to strike down the master agreement as those sections relate to the ambiguity or defectiveness or uncertainty of the language employed in any agreement and not on the point as raised by Mr Ibrahim Hashim. At any rate, the master agreement was duly stamped on 16 May 1977 and that gave it a semblance of legality.

It is now opportune to go direct to the crucial question: Have the appellants revoked the guarantees? The first appellant, through his solicitors, sent a letter to the respondent to the effect that he wanted to withdraw as a guarantor. The letter was dated 21 November 1985 and it was worded thus:

> CWJ/P/M/85
>
> 21 November 1985
> The Manager,
> Asia Commercial Finance (M) Berhad,
> Johor Bahru.
>
> Dear Sir,
>
> Re: Larkin Motor Trading Sdn Bhd
> Mr Siow Kwang Joon @ Siow Kwong Shang
>
> We act for Mr Siow Kwang Joon @ Siow Kwong Shang of No 23, Jalan Bukit Cagar, Johor Bahru.
>
> We are instructed to say that our client wishes to and do hereby withdraw himself as guarantor for the above company as from 21 November 1985 as our client had on 23 October 1985 resigned as a director of the said company. As such, our client would not be liable for any new debts of the said company as from 21 November 1985.
>
> We enclose herewith Form 49 for your reference.
>
> Yours faithfully,
>
> (Sgd)
>
> encl,
> cc Client
> Mr KS Siow,
> M/s Larkin Motor Trading Sdn Bhd,
> 13F, Jalan Larkin,
> 80200 Johor Bahru.

The words employed in the letter of revocation are clear and explicit and it can easily be understood by the respondent. It complied with the requirements as set out in *Commercial Bank of Australia Ltd v Cavanaugh* (1980) 7 NTR 12, in that the terms of effective revocation as to future liability was in writing and it took into account the payment of existing liability of the first appellant. It was a good notice and in my judgment it had revoked the continuing guarantee. The first appellant had, in my judgment, unshackled himself from the bond of suretyship.

The second appellant, on the other hand, by letter dated 18 March 1977, addressed to the respondent adverted to his resignation as a director of Larkin and his hope that his guarantee would be nullified by the respondent. That letter was drafted in this fashion:

Wong Peng Long
8, Jalan Resak,
Taman Majidee,
Johor Bahru.
18th March 1977

BY HAND

Mr Teo Cheng Tong,
Manager, Asia Commercial Finance (M) Bhd,
110, Jalan Trus,
Johor Bahru.

Dear Mr Teo,

Re: My Resignation as a Director of Larkin Motor Trading Sdn Bhd

I refer you to my interview with you at your office recently and as advised by you, I hereby write to you officially of my intention to resign as a director of the above company.

Firstly, as a bank officer of the D & C Bank, I am not allowed to accept or involve in any business undertaking and, secondly, I am very much involved in a variety of community services. I therefore feel I cannot devote any time for business.

I hope that you would assist me to nullify my guarantee as promised by you.

Thanking you for your early action.

Yours faithfully,

(Sgd)
(Wong Peng Long)

cc

Managing Director,
Larkin Motor Trading Sdn Bhd,
13F, Jalan Larkin,
Johor Bahru.

All Directors.

The respondent responded to this letter by sending a short letter to Larkin dated 23 May 1978 in these words:

23 May 1978

Messrs Larkin Motor Trading Sdn Bhd,
No 13-F, Jalan Larkin,
Johor Bahru.

Dear Sirs,

Re: Your Board of Directors

> With reference to your Director's Report accompanying your Annual Statement of Account for the year ending 30 June 1977, we note that Mr Wong Peng Long resigned from the Board on 1 May 1977, and that your present directors are Mr Siow Kwang Joon, Mr Tan Ah Lok, Mr Kwan Fook Nam and Mr Tan Cheo Sai.
>
> Would you kindly let us know if a new director has since been appointed in place of Mr Wong Peng Long.
>
> Yours faithfully
>
> Sgd
>
> ASIA COMMERCIAL FINANCE (M) BHD
>
> TCT/sph.

Several observations must be made in regard to the second appellant's letter dated 18 March 1977. Firstly, it was prepared before the second appellant signed the guarantee document on 14 May 1977. Secondly, Larkin accepted the second appellant's resignation from the board on 1 May 1977 even before the guarantee document was signed by him. Thirdly, the nullification of the second appellant's position as a guarantor was transmitted to the respondent personally. The second appellant was in a better position, as far as the revocation of the guarantee was concerned, than the first appellant. The second appellant withdrew himself as a guarantor before the guarantee document was dated and stamped. The irresistible inference that can be drawn from these set of facts is that the second appellant must have signed the guarantee document, which was undated at the material time, on or before 18 March 1977 — some one month and 26 days earlier if calculated from 18 March 1977 to 14 May 1977. In my judgment, the second appellant had effectively revoked his suretyship on 18 March 1977 and he cannot now be accountable to indemnify the respondent.

Mr Alexander TH Keong, the learned counsel for the respondent, relied on *Lloyd's v Harper* (1880–81) 16 Ch D 290 to drive home the point that in a guarantee where the consideration for which is given once and for all, it cannot be determined by the guarantor, and does not cease on his death. Using this case as an authority, he argued that the appellants here were not in a position to revoke the guarantees which they had tied themselves to. With respect, on the facts, *Lloyd's v Harper* can be distinguished from the present case. *Lloyd's v Harper* was not concerned with a continuing guarantee and the guarantor there did not revoke his guarantee. Briefly, the evidence in *Lloyd's v Harper* showed that in May 1863, Robert Henry Harper was a candidate for election as an underwriting member of Lloyd's, and on 19 May 1863, his father, Samuel Harper, who had been himself a member of Lloyd's for many years, wrote a letter to the committee of Lloyd's as follows:

> My son Mr Robert Henry Harper being a candidate for admission to Lloyd's as an underwriting member, I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagement in that capacity.

In 1876, the father died, and notice of his death was shortly afterwards given to Lloyd's. In 1878, the son became bankrupt, and thereupon ceased

to be a member of Lloyd's. The Court of Appeal, affirming the decision of Fry J, held that the guarantee was not determined by the death of the father or by the notice of it, but that his estate was liable in respect of engagements contracted by the son after his death. It also held that the guarantee extended to all engagements contracted by the son as an underwriting member of Lloyd's, whether with members or with outsiders. Here before me, both the appellants who stood as guarantors did not die and they had, unlike the unfortunate father in *Lloyd's v Harper*, legally revoked their guarantees and they were therefore on firmer ground than that unfortunate father in Lloyd's.

The second issue

It is necessary to examine the guarantee document and for this exercise that guarantee document is now reproduced hereinunder:

GUARANTEE

Pejabat Setem
16 Mei 1977
Kuala Lumpur.

To: ASIA COMMERCIAL FINANCE (M) BHD,
56, Jalan Bukit Bintang,
Kuala Lumpur 06-24,
Selangor.

IN CONSIDERATION of your entering into the agreement on 14 May 1977 with Larkin Motor Trading Sdn Bhd (therein and herein called 'the dealer') I/We the undersigned hereby (jointly and severally) agree:

(1) To pay to you by way of indemnity upon demand all sums that become payable to you by the dealer under the said agreement between you and the dealer.

(2) That your rights under this indemnity shall not be prejudiced by your granting any time or other indulgence to the dealer or any variation in any of the terms of the said agreement, a copy of which I/We acknowledge to have read.

Dated 14 May 1977.

Witness: David Wong Khong Soon	Signed (Sgd)
Address: 8, Jalan Resak, Taman Majidee, JB.	Full name: Siow Kwang Joon
Occupation: Cashier	Address: 28, Jalan Segget, JB.
	Occupation: Company Director.
Witness: Tan Yoke Mui	Signed (Sgd)
Address: 3, Jalan Pedoman, Larkin Garden, JB.	Full name: Wong Peng Long
	Address: 8, Jalan Resak, Taman Majidee. JB.
Occupation: Clerk	Occupation: Company Director.

Of course, in the guarantee document, there were three other guarantors apart from the two appellants, but for the purpose of the present appeal there is no necessity to cite the names of the three other guarantors.

Upon reading the guarantee document, it is abundantly clear that it was couched as an indemnity. The words: 'we ... jointly and severally

agree to pay to you by way of indemnity' explicitly described the role of the guarantors as indemnifiers to the respondent under the master agreement. Even the respondent's rights under the guarantee document were safeguarded by the following words:

> That your rights under this indemnity shall not be prejudiced by your granting any time or other indulgence to the dealer or any variation in any of the terms of the said agreement, a copy of which I/We acknowledge to have read.

The guarantee document must be read with the master agreement and the appellants knew that this was so. I have explained the differences between a contract of guarantee and a contract of indemnity in *Hong Leong Finance Bhd v Thamilchelevan s/o Palinesamy & Anor* [1996] 1 MLJ 351 where at p 360, I said:

> In essence, a guarantee is the promise of one person to be answerable for the debt or obligation of another if that other defaults (see *Moschi v LEP Air Services Ltd* [1973] AC 331; [1972] 2 All ER 393; [1972] 2 WLR 1175).

At p 361 of the same case, I said:

> Whereas the contract of indemnity is said to be 'a contract by one party to keep the other harmless against loss' (*Yeoman Credit Ltd v Latter* [1961] All ER 294; [1961] 1 WLR 828 at pp 830–831) and is not dependent on the continuing liability of the principal debtor.

Both the appellants here contracted with the respondent to keep the respondent 'harmless against loss.' The description 'contract of indemnity' is normally confined to those contracts where the sole purpose is merely to save the promisee from loss caused by the claims of third parties and it will not include a contract of marine insurance against loss or damage to the subject matter of the insurance (*Jones v Birch Bros Ltd* [1933] 2 KB 597 at p 606; *Lothian v Epworth Press* [1928] 1 KB 199 at p 202). The term 'contract of indemnity' is generally used in law to denote a contract by which the promisor undertakes an original and independent obligation to indemnify, as opposed to and distinct from a collateral contract in the nature of a guarantee by which the promisor undertakes to answer for the default of another person who is primarily liable in law to the promisee (*Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at p 555).

From the authorities which I have read, to ascertain and determine whether a contract is one of guarantee or of indemnity is entirely a question of construction in each particular case: *Moschi v Lep Air Services Ltd* [1973] AC 331 at p 349; [1972] 2 All ER 393 at p 402. The best way to do it is this: read the agreement and see whether the parties have described their agreement as an 'indemnity' or as a 'guarantee', or whether the body of the agreement contains the expression in a number of times (*Hong Leong Finance Ltd v Thamilchelevan s/o Palinesamy* [1996] 1 MLJ 351). Another guide would be to see whether the creditor's rights as against that of the principal debtor or as against that of the indemnifier or guarantor are the same. Thus, in the event the person liable under the agreement is liable even though the principal debtor is not in default (*Chitwell Shipping Ltd v State Bank of India, The World Symphony* [1987]

A 1 Lloyd's Rep 165), or for that matter he is liable for a sum greater than principal debtor (*Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at p 296), then that agreement will in all probability be construed as an indemnity. All the cases show the need to construe the agreement in a reasonable way by taking into account all the surrounding circumstances. I need to cite only three cases on this point. The first would be *Oriental* B *Bank of Malaya Ltd v N Subramaniam* [1958] 24 MLJ 35, where it was held that the letter of guarantee must be construed with regard to the surrounding circumstances. The second is the case of *Chow Yoke Pui v Hongkong & Shanghai Banking Corporation, Malacca* [1971] 2 MLJ 100, where the Federal Court held the view that a guarantee must be construed C reasonably by looking at the surrounding and special circumstances and also by construing the words employed therein. The third is the case of *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani* [1986] 1 MLJ 16, which cited favourably a passage from the judgment of Fry J in *Lloyd's v Harper* (1880–81) 16 Ch D 290 in the following terms:

D

> A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances.

The difficulty in distinguishing between an 'indemnity' and a 'guarantee' was voiced by Harman LJ in *Yeoman Credit Ltd v Latter* [1961] 2 All ER E 294 at p 299; [1961] 1 WLR 828 at p 835 where His Lordship observed that the question to distinguish between a contract of guarantee and a contract of indemnity was:

> ...a most barren controversy. It dates back .... to the Statute of Frauds 1677, and has raised many hair-splitting distinctions of exactly that kind which F brings the law into hatred, ridicule and contempt by the public ... and the decided cases on the subject are hardly to be reconciled.

Be that as it may, it is my judgment that the appellants here merely signed an indemnity to indemnify the respondent and since they have revoked that indemnity, it follows that no liability would attach to them.

G That is not the end of the matter. Mr Ibrahim Hashim, learned counsel for the appellants, raised a fresh point which was not argued before the trial court and he strenuously argued that I have the jurisdiction to hear and adjudicate on that fresh point. I am always mindful of the fact that a point which is not raised at the first instance but is raised for the first time before me must always be 'jealously scrutinized' to ensure its validness: H *The 'Tasmania'* (1890) 15 App Cas 223, 225. It is entirely up to the discretion of the appellate court whether to allow that fresh point to be ventilated (*Perkowski v Wellington Corp* [1959] AC 53, 69), and the appellate court would always be guided by the principles as propounded by Lord Watson in the case of *Connecticut Fire Insurance Co v Kavanagh* [1892] AC I 473 at p 480 before exercising the discretion to allow the fresh point to be taken. This was what Lord Watson said in that case:

> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that

> course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated would have supported the new plea.

What was the fresh point raised for the first time? It was simply on the issue of illegality. The illegality that was sought to be relied upon by Mr Ibrahim Hashim was that the guarantee document offended against s 2 of the Hire Purchase Act 1967 and consequently, it was null and void and of no effect. Larkin was represented by the second appellant when it signed the master agreement with the respondent. The second appellant also stood as one of the guarantors and he signed the guarantee document. The second appellant as the representative of Larkin should not have signed the guarantee document and be one of the guarantors (*Hong Leong Finance Bhd v Thamilchelevan s/o Palinesamy* [1996] 1 MLJ 351) and it was for this reason that Mr Ibrahim Hashim sought to impugn the guarantee document as null and void and of no effect for illegality. This was the fresh point that was strenuously pursued by him before me. In my judgment, it is now settled law that any contract including a contract of indemnity like the present case which is prohibited by statute, either expressly or by necessary implication, is illegal and void: per Parke B in *Cope v Rowlands* (1836) 2 M & W 149; 150 ER 707. In the same case Parke B said (2 M & W 149 at p 157; 150 ER 707 at p 710):

> It is perfectly settled that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition .... And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?

Gibbs ACJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 said:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.

Lindley LJ in *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 made general observations on the issue of illegality of contract in the following words:

> Ex turpi causa non oritur actio. This old and well-known legal maxim is founded on good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v Johnson Cowp* 343.

In *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416, the court had to consider the question of the reception of a fresh point not argued in the court below nor set out in the pleadings. The appellants there wanted to introduce and argue a fresh point that they, as owners of a plank house, had an equitable interest in the land and were therefore not trespassers. In rejecting the application, Mohd Azmi SCJ (now FCJ), on behalf of the court, stressed the importance of adhering to pleadings at p 418 in this way:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 at p 233:
>
> > 'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...'

The new point raised in *Muniandy* was not on illegality as was raised in the present appeal.

The Federal Court in the case of *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 considered the issue of illegality. Ismail Khan CJ (Borneo) writing for the Federal Court had this to say:

> The point whether the court can take cognizance of a point of illegality, whether pleaded or not, has been the subject of numerous decisions. I need only refer to the case of *Snell v Unity Finance Ltd* [1963] 3 All ER 50 at p 55 where most of the authorities were dealt with. In that case, Willmer LJ referred with approval to the propositions set out by Devlin J in *Edler v Auerbach* [1949] 2 All ER 692 who, following the reference to *North-Western Salt Co United v Electrolytic Alkali Co Ltd* [1914-15] All ER Rep 752, said [at p 697]:
>
> > 'That case authorises, I think, four propositions: first, that where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that where, as here, the contract is not ex facie illegal, evidence of extraneous circumstances tending to

show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which, taken by themselves show an illegal object, have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it, but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not'.

In *Narayanan v Kannamah* [1993] 3 MLJ 730, I had occasion to say at p 734:

> The court is empowered at its will to adjudicate the case according to the law even though the issue is not pleaded. Thus, where a statute makes a particular contract or class of contracts void, the court will refuse to allow an action to be maintained thereon, even though the objection is not pleaded and the parties do not desire to rely on it (see *Royal Exchange Assurance Corp v Vega* [1902] 2 KB 384, where the contract was invalid under s 93(3) of the Stamp Act 1891). But if, like the present appeal, the illegality is patent on the face of the statement of claim, it would be a good ground for an objection in point of law and this court is entitled to act upon it (*North Western Salt Co v Electrolytic Alkali Co* [1914] AC 461).

Further down the same page in the same judgment, I said:

> Bankes LJ succinctly said in *Re Mahmoud & Ispahani* [1921] 2 KB 716 (at p 726) that there is no qualification to 'the established rule of law that the court will never lend its aid in the enforcement of a contract which is ab initio illegal.

Finally, Gopal Sri Ram JCA in *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141 said:

> We accept as beyond argument that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it. See, *Natha Singh v Syed Abdul Rahman & Anor* [1962] MLJ 265; *Nasib Singh v Ramasamy* [1969] 1 MLJ 211.

Mr Ibrahim Hashim alerted me on the issue of illegality and even though it was not argued before the trial court nor pleaded, yet I am obliged, and I so do, to consider the illegality issue. I ruled that the contract of guarantee which was in fact a contract of indemnity contravened s 2 of the Hire Purchase Act 1967 and it was void, illegal and of no effect.

For the reasons adumbrated above, I had no choice but to allow the appeal of both appellants with costs.

Appeal allowed.

Reported by Jafisah Jaafar